In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 678

FLAMBEAU PLASTICS CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–17) is not yet reported. The Board's Decision and Order (R. 4–75)[1] are reported at 167 NLRB No. 102.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1968 (Pet. App. 18–19). The petition for a writ of certiorari was filed on October 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the Joint Appendix in the court below.

QUESTIONS PRESENTED

1. Whether petitioner unlawfully withdrew recognition from the Union on the ground that it no longer represented a majority of the employees, where such loss of support was attributable to petitioner's unfair labor practices.

2. Whether petitioner unlawfully discriminated against striking employees by depriving them of vacation pay which they had previously earned.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at page 4 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In March 1963, the Union [2] was certified as the collective bargaining representative of the Company's production, maintenance, shipping, and warehouse employees. After proceedings in which the Board found that the Company had refused to bargain and engaged in other unfair labor practices, a one-year collective bargaining agreement was finally entered into on May 17, 1965 (R. 12; 376, 392; 151 NLRB 591).

In October 1965, the Company issued a revised version of its employees' handbook. For the first time, the handbook omitted reference to the Company's

[2] Local No. 380, Industrial Union, Allied Industrial Workers of America, AFL–CIO.

grievance procedure, which the contract had augmented by permitting the employees to have Union representation in grievance matters. The handbook mentioned the Union only to emphasize that employees had the right to join or refrain from joining unions as they wished. (R. 14–19, 35.)

Pursuant to the Union's request to negotiate a new contract, a series of bargaining sessions commenced in early April 1966 (R. 59–61; 268–279, 418–435, 441–442). On April 26 the Company, without informing the Union, filed a petition with the Board to add to the bargaining unit certain employees whom the Company planned to train for advanced positions (R. 24; 400–404, 146, 82–88).[3] In the bargaining sessions, the Company refused to agree or compromise on any of the Union's proposals including a union-shop provision, which the employees had approved by a vote of 113 to 21 in an election conducted pursuant to State law (R. 61–62; 286–287, 313, 436–437, 444). On June 15, the employees struck (R. 29; 289–290, 141–142). Two days later, the Company put in effect a four-cent wage increase which the Union had previously rejected (R. 59–61; 268–279, 441–442). Efforts at conciliation by the Federal Mediation and Conciliation Service were unsuccessful despite concessions by the Union (R. 59, 62–63; 286–289, 318–319).

During the strike, the Company assisted 15 employees in withdrawing from the Union (R. 29–31; 192–193, 165–167, 106–110, 183–185, 171–177, 407–408),

[3] When the Union learned of the existence of the program, it requested bargaining on this issue, which the Company refused (R. 24–25; 146–147).

kept the activities of the striking employees under photographic surveillence (R. 35–37; 224–228 342, 409–410), and accelerated employee promotions in derogation of the contract and its own past practice (R. 46–47; 394–397, 388). On September 15, 1966, the Company withdrew recognition from the Union, claiming that it had lost its majority (R. 40, 65; 417). The Company also paid non-striking employees the vacation benefits which they had earned under the lapsed agreement, but refused to make such payments to the strikers (R. 41, 222.)

B. THE DECISIONS BELOW

The Board found that the Company violated Section 8(a)(5) of the Act by issuing an employee handbook which had the effect of undermining the Union; by refusing to bargain with the Union with respect to the institution of a progressive training program; by negotiating without a good-faith intention to reach a new agreement; by withdrawing recognition from the Union on September 15, 1966; and by accelerating the reclassification of non-striking employees and thereby granting them a wage increase never offered to the Union in the negotiations (R. 23, 28, 48, 64–65). The Board further found that the June 15 strike was caused by the Company's unlawful refusal to bargain with the Union, and that any loss in the Union's majority status was attributable to the Company's unfair labor practices (R. 65–66). In addition, the Board found that the Company violated Section 8(a)(1) of the Act by engaging in surveillence of Union activities and assisting employees in withdraw-

ing from the Union (R. 35, 38), and that it violated Section 8(a)(3) by discriminatorily denying vacation pay to the strikers (R. 44). The Board ordered the Company to cease and desist from the unfair labor practices found; to make the striking employees whole for any loss of vacation pay which they may have suffered; to reinstate them, upon application, to their former positions with the benefit of the accelerated reclassification; and to bargain, upon request, with the Union (R. 70–72).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 1–17).

ARGUMENT

1. Petitioner's contention (Pet. 7–10) that it was justified in withdrawing recognition from the Union because it had reasonable grounds for believing that the Union had lost majority support is fully answered by the findings of the Board (R. 65–66) and the court of appeals (Pet. App. 14 n.13) that any loss of majority was attributable to petitioner's unfair labor practices. It is well settled that, in these circumstances, petitioner was not relieved of its duty to recognize and bargain with the Union. See *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702; *National Labor Relations Board* v. *Warren Co.,* 350 U.S. 107, 112; *National Labor Relations Board* v. *Poultry Enterprises, Inc.,* 207 F. 2d 522, 525 (C.A. 5).[4]

[4] Although petitioner apparently assumes (Pet. 8–9) that its unfair labor practices were mere technical violations of Section 8(a)(1), the Board found (R. 64) that petitioner committed

2. Petitioner's argument (Pet. 10–12) that the withholding of vacation benefits from the strikers was not discriminatory rests on the premise that those benefits had not accrued under the contract before the strike started on June 15, 1966. That premise, however, was rejected by the court of appeals in light of the precontract practice and the contract itself,[5] and the contention does not warrant further review. See *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502. The court of appeals correctly held that this case was controlled by *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, in which the employer, without any legitimate justi-

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substantial unfair labor practices which "clearly show its rejection of the [principles] of collective bargaining and of the purposes and policies of the Act."

[5] The contract provided that (R. 386):

> Employees who during the year preceding August 1 were continuously on the payroll of the Company for the previous year and work up and through the last scheduled workday prior to the declared vacation period, will be eligible for vacation time off and pay * * *.

As the court below found (Pet. App. 16), both the contract itself and the Company's precontract practice (on which the contract was patterned) indicate that the terminal date for vacation eligibility was August 1, 1965 (rather than August 1, 1966, as the Company contended), and thus those strikers who had been on the payroll for the year prior to that date qualified for vacation benefits before the strike started on June 15, 1966. Nor is a different conclusion required by the provision of the contract (R. 388) that "[v]acation pay is incidental to vacation time off and is not considered to accrue for each day or month of employment." Under the contract, vacations could be taken at any time between June 1 and December 31, 1966 (R. 41). Accordingly, as the court below further found (Pet. App. 17), "when the employees went off the job on June 15, 1966, their action was tantamount to taking 'vacation time off.'"

fication, denied strikers vacation benefits which they earned before the strike, while continuing to pay such benefits to non-strikers.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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